



# Department of Justice

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FOR IMMEDIATE RELEASE  
TUESDAY, AUGUST 7, 2001  
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**ASSISTANT ATTORNEY GENERAL CHARLES A. JAMES ANNOUNCES  
NEW PROGRAM FOR CONDUCTING MERGER INVESTIGATIONS**

**Program will Improve Critical Legal and Economic Issue Identification, Facilitate More Efficient and Focused Discovery, Provide Orderly Process for Evaluating Evidence**

WASHINGTON, D.C. – Charles A. James, Assistant Attorney General for the Antitrust Division, today announced a new program for conducting merger investigations to more quickly identify critical legal and economic issues regarding transactions, facilitate more efficient and more focused investigative discovery and provide for an orderly process for the evaluation of evidence. The program was unveiled today at the American Bar Association's 124<sup>th</sup> Annual Meeting in Chicago.

The program, which will be implemented in September, has two parts: (1) aggressive use of the initial Hart-Scott-Rodino 30-day waiting period to identify possible competitive issues and routes of inquiry; and (2) early consultations with parties to negotiate, where possible, a specific framework for conducting an investigation.

The Hart-Scott-Rodino Act of 1976 (HSR), an amendment to the Clayton Act, imposes waiting period requirements on individuals and companies over a certain size that contemplate mergers or acquisitions of stock or assets over a certain value.

"This new program will introduce more order into the investigative process, eliminate needless tactical maneuvering and reduce both public and private investigative burden," said

James. "Ultimately, both sides will be able to proceed with greater certainty as to how an investigation will be conducted."

Under the program, the Antitrust Division's chiefs, in consultation with the relevant Deputy Assistant Attorney General, will be authorized to commit the Division to procedural agreements, subject to the parties fulfilling their obligations. In appropriate cases, the Division may commit to time tables for reaching interim investigative conclusions, articulating specific competitive concerns or making final enforcement decisions regarding the proposed transaction. The parties, in turn, will be asked to commit to specific procedural undertakings with regard to the submission of information and compliance with particular investigative requests.

Key factors in determining how a procedural agreement should be structured, if at all, include: the complexity of the transaction under review; the Division's expertise in the markets and issues under investigation; the volume, types and availability of information required to make an appropriate law enforcement decision; and the likelihood of litigation in the event of an adverse prosecutorial decision.

Potential models for procedural agreements might include the following:

- In matters where the Division has considerable industry experience and the outcome of the investigation is likely to turn upon one or two key issues, the Division may be willing to focus almost exclusively on those issues during the precomplaint investigation, subject to appropriate timing and procedural protections for the Department in the event of a challenge to the transaction.
- The Division may be willing to commit to providing substantive status reports to the parties at important junctures of the investigation, subject to the parties' willingness to provide needed information on a timely basis.
- The Division may enter detailed investigative schedules culminating in a date certain for the ultimate enforcement decision by the Assistant Attorney General.

Parties may also offer alternative models for procedural agreements that serve the dual purpose of focusing the investigation while protecting the Division's law enforcement options.

"The ultimate success of this program will depend upon the parties' willingness to recognize the Antitrust Division's legitimate investigative needs and to work with Division staff to meet those needs in a flexible manner," said James. "This program should also allow the Division to deploy its investigative resources more efficiently."

If the parties choose to simply comply with the HSR second request process as they have done in the past, the Division in turn will adhere to the statutory waiting periods. Under the Act, the parties to a reportable transaction must wait 30 days after the transaction is reported before the deal may be consummated. If during that initial 30-day waiting period the Antitrust Division issues a request for additional information, referred to as a "Second Request," the Division has an additional 30 days after the parties have substantially complied with the Second Request within which to make an enforcement decision.

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